STATE OF MICHIGAN

SUPREME COURT

Associated Builders and Contractors,
Saginaw Valley Area Chapter,

Plaintiff/Appellant,

-vs-

SC: 124835
COA: 234037
Midland CC: 00-2512-CL-L

Director of the Michigan Department
Of Consumer & Industry Services and
Midland County Prosecuting Attorney,

Defendants/Appellees,

and

Michigan State Building & Construction
Trades Council, et al,

Intervenors/Defendants-Appellees,

and

Saginaw County Prosecuting Attorney,

Intervenor/Appellee.

INTERVENORS/DEFENDANTS/APPELLEES' JOINT REPLY TO PLAINTIFF/APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The Michigan Chapter of the National Electrical Contractors Association, the Michigan Mechanical Contractors Association, the Michigan Chapter of the Sheet Metal Air Conditioning Contractors National Association, and the Michigan State Building and Construction Trades Council ("Intervenor Defendants") jointly file this Reply Brief to respond to the Supplemental Brief filed by Plaintiff-Appellant Associated Builders and Contractors, Saginaw Valley Area Chapter ("Plaintiff" or "ABC").

In its Supplemental Brief, Plaintiff again takes the position with respect to the Prevailing Wage Act (PWA) that the mere existence of a statute to which its member are subject – without any evidence that even one ABC member is facing or will imminently face sanctions of some kind which are traceable to the alleged constitutional infirmities asserted by Plaintiff – is sufficient to create an "actual controversy" and confer standing.

Under this approach, for example, any lawyer – because he is subject to the Code of Ethics – could seek to judicially strike down the Code, even though he is not facing any actual or imminent sanction, and without even any specific incident having triggered his "claim." The Michigan Constitution requires far more than that to establish a justiciable controversy. This Court should deny leave to appeal

II. ARGUMENT

A. The Mere Fact That a Statute Exists and One Is Subject to it Is Insufficient to Confer Standing.

Plaintiff's novel approach to standing reflects a fundamental misunderstanding of the controlling precedents of this Court and the U.S. Supreme Court on the subject. And, Plaintiff's

position reveals the true nature of this lawsuit as "legislative," not judicial. Plaintiff does not seek a judicial remedy to a concrete and specific dispute involving the actual or imminent enforcement of the PWA by a state Defendant (i.e. the Department of Labor and Economic Growth (DLEG), Prosecutor Donker or Prosecutor Thomas) against at least one of Plaintiff's members. Rather, Plaintiff seeks, in a very real sense, the total repeal of the PWA. That is a job for the Legislature, not the courts.

As Justice Scalia, writing for the majority in *Lewis v Casey*, 518 US 346, 350; 116 SCt 2184; 135 LEd 2d 606 (1996), explained:

> [T]he distinction between the two roles [of the courts vs. the political branches] would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, **but merely the status of being subject to a governmental institution that was not organized or managed properly.** (emphasis supplied)

Accord, *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 619-620; 684 NW2d 800 (2004); *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 735-736; 629 NW2d 900 (2001).

In the Court of Appeals and in its Application for Leave to Appeal to this Court, Plaintiff relied on the affidavits of Gary Tenaglia and Lee Goulet to support its claim that at least one ABC member had suffered an "injury in fact" sufficient to create an "actual controversy" and establish the associational standing of ABC. As the Court of Appeals correctly concluded, neither those affidavits, nor any other affidavits or documentary evidence submitted by Plaintiff, were sufficient to establish an "actual controversy." The relevant affidavits do not detail any specific dispute involving actual or imminent injury or sanctions, in relation to Plaintiffs' claims, which would be capable of resolution by a court. In short, Plaintiff has failed to establish that any ABC member has suffered an "actual or imminent" "injury in fact" which is "concrete and particularized," "fairly

traceable to the challenged action of the Defendant" and likely to be "redressed by a favorable decision." *Nat'l Wildlife Federation, supra,* 471 Mich at 628-629; *Lee, supra,* 464 Mich 726 at 739; *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 SCt 2130; 119 LEd 2d 351 (1992).

B. Injury-in-Fact Must be Examined in Light of the Claims Asserted.

In order to determine whether an actionable controversy exists here, it is necessary to closely examine the specific claims asserted – i.e., the specific rights which Plaintiff claims have been violated – in relation to the claimed injuries as reflected in the relevant affidavits.[1] As the Supreme Court has explained in *Lewis v Casey*, *supra,* "[s]tanding is not dispensed in gross." 518 US at 357, n6. As the Court further explained:

> The actual-injury requirement would hardly serve the purpose we have described above – of preventing courts from undertaking tasks assigned to the political branches – if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration. **The remedy must of course be limited to the**

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[1] Plaintiff also argues in its Supplemental Brief that the Court of Appeals erred by failing to construe the allegations in Plaintiff's complaint as true for purposes of establishing standing. This argument must be flatly rejected. There is no question that both Plaintiff and Defendant Donker submitted affidavits in support of their respective positions on the Motion for Summary Disposition seeking to dismiss for lack of an "actual controversy." There is no question that both the trial court and the Court of Appeals considered and relied on these affidavits, and that Plaintiff continues to rely on the affidavits here before the Supreme Court. As reflected in the Court of Appeals' Opinion, at 5, the Motion was brought under MCR 2.116(C)(4)(8) and (10). It is black letter Michigan law that where, as here, the trial court relies on materials beyond the pleadings, the appellate court will deem the motion to have been decided under MCR 2.116(C)(10). *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 31; 627 NW2d 5 (2001). Accordingly, the factual basis of standing was properly analyzed by the Court of Appeals: The case was not still at the pleading stage, but rather the summary judgment stage (i.e., the MCR 2.116(C)(10) stage). As this Court held in *Nat'l Wildlife Federation,* "[i]n response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken as true." 471 Mich at 631, citing *Lujan*, 504 US at 561.

inadequacy that produced the injury in fact that the plaintiff has established.

Id, at 358. (Citation omitted)(emphasis supplied).

Plaintiff has failed to establish a justiciable controversy because (as the Court of Appeals properly found) none of the affidavits [2] establish any actual or imminent, concrete and particularized injury to any ABC member *which is fairly traceable to Plaintiff's constitutional challenges.* Plaintiff claims that the PWA is unconstitutional in two respects. First, Plaintiff claims that the PWA is unconstitutionally vague. Second, Plaintiff claims the PWA, as applied, involves an unconstitutional delegation of legislative authority as the result of the alleged failure of the DLEG to adequately account for "two tier" collectively bargained wage scales, or multiple collective bargaining agreements or understandings, when it compiles prevailing wage rates.

With respect to the delegation claim, **none of the remaining affidavits even mention the delegation issue**, let alone establish an actual injury – of any kind – traceable to the alleged unlawful delegation.[3] Nor is there any other such evidence. As the Court of Appeals properly concluded, "plaintiff submitted no evidence linking the CBA or the addendum it alleges went undisclosed to the CIS to any actual loss, injury or threatened or actual prosecution under the PWA." Opinion, at 11. In short, there is simply **no evidence that any ABC member has suffered any injury** – let

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[2] The Tenaglia Affidavit, as noted previously (See Intervenor Defendants' Supplemental Brief at 6-7 and Ex. 1 thereto) and as Plaintiff concedes (See ABC's Supplemental Brief at 9, n6) is no longer relevant or material to Plaintiff ABC's standing, because Tenaglia's company is no longer in business and neither Tenaglia nor his company are ABC members.

[3] While the Tenaglia Affidavit *mentions* the delegation issue, even if that affidavit were still relevant, it contains no facts showing that any current (or past) ABC member suffered any specific injury as a result of the alleged unlawful delegation. Moreover, the Affidavit does not even refer to any identified (or unidentified) ABC member, but only to generic and unidentified "non-union contractors."

alone any "actual or imminent" "concrete and particularized" injury – as a result of the unlawful delegation which Plaintiff alleges.

With respect to Plaintiff's vagueness claim, again, none of the affidavits come even close to establishing any concrete, particularized, actual or imminent injury *traceable to the PWA's challenged vagueness.* The affidavits merely contain boilerplate,[4] generalized and undifferentiated recitations that the affiants have had difficulty understanding the PWA's requirements. But there are no specifics reflecting any actual, particular instance of such "difficulty," let alone any instance of enforcement, or imminent enforcement, of the PWA against the affiant resulting from an actual application of the unidentified vague language.

The only specific example offered regarding the vagueness claim in any affidavit is the "Dryvit" incident mentioned in the Goulet affidavit. But as the Court of Appeals correctly concluded, Goulet never suffered harm, and certainly not any imminent harm, as a result. Not only is there no evidence that Mr. Goulet (or his company) was ever prosecuted or threatened with prosecution, or that any prosecution was even considered, there is no evidence of any sanction or harm of any kind which Mr. Goulet or his company ever suffered as a result of this incident. The Goulet affidavit, in short, simply fails to establish any actual injury sufficient to confer standing. [5]

Moreover, even if the Dryvit incident were considered to have resulted in a past justiciable injury, past injury is insufficient to confer standing to seek prospective relief. See *Grendell v Ohio*

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[4] Indeed, the Johnson, Bauer and Sugar affidavits not only contain no specifics, they are virtually word-for-word identical.

[5] The same reasoning applies to the 14-year-old "Kalamazoo Sprinkler" incident, as the Court of Appeals properly concluded. Moreover, like the generic "non-union" contractors mentioned in the Tenaglia Affidavit, there is no evidence that the Kalamazoo Sprinkler Company was (or is) an ABC member.

Supreme Court, 252 F3d 828, 832-833 (CA6 2001). See also, *Whitmore v. Arkansas,* 495 US 156, 158; 110 S Ct 1717; 109 L Ed 2d 135 (1990) ("Allegations of possible future injury do not satisfy the requirement of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact.") (Citations omitted) Finally, even if the Dryvit incident were a sufficient injury in fact, that injury would, at most, confer standing to challenge the PWA's alleged vagueness as applied in that case. It **would not** confer standing to challenge any other allegedly vague aspect or application of the PWA. *Lewis v Casey, supra,* 518 US at 357-358, & n6.

In sum, standing must be examined in light of the claims asserted. Here, Plaintiff has failed to establish an "injury-in-fact" with respect to even one of its members that is fairly traceable to the vagueness and delegation challenges Plaintiff asserts. That is why (among other reasons) *Associated Builders and Contractors v Perry*, 1994 US Dist Lexis 8437 (ED Mich 1994); *rev'd on other gds*, 115 F3d 386 (CA 6 1997) does not help Plaintiff. As an initial matter, the standing analysis employed by the court in that case is no longer good law (if it ever were). And, in any event, the case is clearly distinguishable because unlike here, there was at least some nexus between the claim asserted (ERISA preemption) and the alleged injury-in-fact (interference with fringe benefit plans).

First, the court in *Perry* adopted an overly expansive test for standing which cannot be squared with more recent pronouncements of the U.S. Supreme Court, this Court, or the federal appellate courts.[6] The *Perry* court rejected the argument that proof of particularized injury-in-fact was needed as to each provision or practice the plaintiff was challenging in order to establish

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[6] Moreover, the case is of no precedential value here. It is an unreported federal district court decision that is not even binding in the Eastern District of Michigan.

standing for that particular challenge. *Id*, at *12 - 16.[7] That result is directly contrary to the now well-established teachings of the U.S. Supreme Court in *Lewis v Casey, supra* (decided 2 years after *Perry*):

> [S]tanding is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.

518 US at 358, n6.

Notably, the court in *Perry* never cited *Lujan v Defenders of Wildlife, supra*, now recognized in Michigan and the federal courts as the touchstone of standing jurisprudence. And the *Perry* court never considered or applied *Lujan's* requirement that the injury-in-fact must be "fairly traceable" to the challenged conduct. Nor can *Perry* be squared with the reasoning of cases such as *Grendell v Ohio Supreme Court*, 252 F3d 828, 832-835 (CA 6 2001) and *Thomas v Anchorage Equal Rights Comm'n*, 220 F3d 1134 (CA 9 2000) (*en banc*), which preclude standing where, as here, the plaintiff is neither violating nor specifically planning to imminently violate the challenged law, and is not facing actual or imminent prosecution or other sanction under the challenged law. (See Intervenor Defendants' Supplemental Brief at 9-13)

Perry is clearly distinguishable in any event. That case *might* help Plaintiff if Plaintiff were asserting an ERISA preemption challenge to the PWA. But it is of no utility here, where Plaintiff

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[7] The *Perry* court based this conclusion, in part, on its determination that the ERISA preemption issues in the case did not rise to the level of "constitutional adjudication," and therefore permitted a more relaxed standard to establish standing. *Id*, *15. This rationale betrays a fundamental misunderstanding by the *Perry* court of the law of standing. In any event, it serves as an additional basis to distinguish the case. Here, of course, we **are** dealing with "constitutional adjudication" and therefore a "heightened standard" for standing should apply, even according to the *Perry* court.

has failed to establish any injury-in-fact to any ABC member traceable to the vagueness and delegation claims Plaintiff is asserting. In *Perry*, the court found that the plaintiff had alleged and proved (unlike here) actual harm that was directly related to the claim asserted, and therefore had sufficiently established standing. The plaintiff asserted a right, based on ERISA preemption, to be *entirely free from regulation by the State of Michigan of its members' fringe benefit plans.* The plaintiff provided specific proof that an identified member was forced to alter its fringe benefit plans when working on prevailing wage projects, and that the member suffered discrimination in its ability to bid as a result. Thus, unlike here, there was a nexus between at least some aspect of the claim asserted and the injury-in-fact on which standing was premised.[8]

III. CONCLUSION

Plaintiff has presented nothing but vague, generalized and undifferentiated hypotheticals. These hypotheticals are not tied to any particular event or "case." They make it impossible for this Court, or any court, to focus its analysis in a manner that would allow it to grant *judicial relief.* This is precisely the type of case which the "actual controversy" requirement was meant to prevent courts from deciding. As this Court recognized in *Nat'l Wildlife Federation*, "[there are] sound reasons... for believing that the hard, confining and yet enlarging context of a real controversy leads to sounder

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[8] The *Perry* court apparently assumed, without any proof, that the member was in fact "forced" to change its fringe benefit plans. The court therefore never addressed the critical issue presented here, that there can be no constitutionally sufficient "injury-in-fact" merely because a law exists and the plaintiff is subject to the law, but is not facing any actual or imminent prosecution or other sanction, and is neither violating nor planning to imminently violate the law. Here, although Plaintiff repeatedly *claims* that its members are "forced" to comply with the PWA, it has provided no proof that any member was, *in fact*, "forced" to do anything. Nor does Plaintiff explain *how* any member was "forced" or *by whom.* Finally, Plaintiff provides no evidence that any of the state Defendants – DLEG, Donker, or Thomas – "forced" any ABC member to comply with the PWA.

and more enduring judgments." 471 Mich at 608 (citation omitted). Most importantly, as this Court has cautioned, relaxing justiciability requirements to hear cases like this one, where "[t]he whole process has a 'legislative' or even 'administrative' look[,]" presents grave dangers to our democratic process. *Id*, 620-621 (citation omitted) Leave to appeal should be denied.

Respectfully submitted,

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